No. 21,232

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,

Appellant,

vs.

ANNA NICKEL SMELTING COMPANY, corporation, and THE HANNA INING COMPANY, a corporation,

Appellees.

ANNA NICKEL SMELTING COMPANY, corporation, and THE HANNA INING COMPANY, a corporation,

Cross-Appellants,

vs

NITED STATES OF AMERICA,

Cross-Appellee.

On Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

REPLY BRIEF OF CROSS-APPELLANTS

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SUBJECT INDEX

TABLE OF CASES

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No. 21,232

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REPLY BRIEF OF CROSS-APPELLANTS

1. The District Court erred in reforming the agreed ceiling price under the 1961 agreement ("Amendment 5").

The contract which the District Court reformed provided that the ceiling price on the last 19,500,000 pounds of nickel would be $.5877 per pound.

The briefs and the authorities agree that, to support

a decree of reformation, there must be (i) clear and convincing evidence of (ii) a meeting of the minds of the parties on an agreement which (iii) by mutual mistake differs from (iv) the agreement actually recorded in writing.

The District Court found, by implication if not quite explicitly, that by mutual mistake the agreement stated a ceiling price of $.5877, whereas the parties had actually agreed upon a formula for fixing a ceiling price. What was that formula?

From the dollar amounts in the District Court's decree, it follows that the alleged formula was either (a) Hanna's 1960 production costs (after adjustment for nonrecurring costs and after audit), plus or minus the difference between its 1960 costs as adjusted and audited and its previously audited 1959 costs, as adjusted; or (b) Hanna's 1960 production costs, after adjustment and audit, minus the excess, if any, of its previously audited 1959 costs, as adjusted, over its 1960 costs, as adjusted and audited.

Where is the necessary "full, clear, cogent, and decisive"[1] evidence that the parties agreed on any such thing in lieu of what appears in the contract? The negotiation was by an exchange of letters which are in the record (O'Dwyer's testimony relates only to the thought processes which lay behind the Government's letters, not to any communication with Hanna); and in these letters there is no scintilla of evidence that the

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1. Lundgren v. Freeman, (CA 9 1962) 307 F2d 104 at 113.

rties agreed, or would have agreed, to any such formula.

These letters make it clear that the Government wanted e benefit of any continued decline of Hanna's future actual oduction costs; that, in view of the stretch-out of deliveries, wanted protection against higher production costs in periods low production and therefore wanted a definite, fixed ceiling ice per pound; that it wanted this ceiling price to be lower an the lowest production cost attained by Hanna to that date; at it realized that in negotiating the ceiling price it was aling -- and it intended to deal -- not with audited production sts, but, as the letters stated, with "projections" and "esti-tes" based on 1960 costs known to be unaudited.[2] The Govern-nt's proposal to Hanna was a ceiling price of $.5877. The vious and sole reason for including the mathematical analysis ong with the Government's proposal was to persuade Hanna that e $.5877 proposal was not unreasonable and should be accepted. ere is no evidence in the exchange of correspondence (the only idence relating to the agreement between the parties) of an reement on a formula which was mistranslated into a definite ice in the written contract.

In light of the foregoing, it is not surprising that e District Court's findings are technically insufficient to

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Amendment 5 was signed April 20, 1961, effective from April 1, 1961. The letters leading up to it were written in March, 1961; the Government's proposal and the mathematics on which it now relies were contained in its letter of March 9, 1961. The Government's regular audit of Hanna's 1960 costs began in February, 1961 and continued into June, 1961. See 253 F Supp at 794.

support a decree of reformation. The only finding on this subject is that the price "was computed by an agreed formula which was based upon the difference between the Company's costs of production in 1959 and 1960." There is no finding as to precisely what this agreed formula was, and no finding that the parties mistakenly failed to translate it into words in the contract in lieu of using the figure of $.5877. Under the cases defining the requirements of reformation, therefore, the findings are insufficient to support a decree of reformation. For the reasons stated above, the necessary findings could not have been made upon this record.

It was "clearly erroneous" for the District Court to view the evidence as "full, clear, cogent, and decisive" in support of the Government's allegation of mutual mistake. The decree of reformation must, therefore, be reversed.

2. The District Court abused its discretion and erred in awarding prejudgment interest.

The Government defends the District Court's award of prejudgment interest only on the ground that it was a discretionary ruling (Gov Reply Br 32). The question, however, is whether under the circumstances of this case the Court's ruling was consistent with established principles which govern its discretion to make such an award: That prejudgment interest is generally disallowed where, as here, the claim is unliquidated (Miller v. Robertson, (1924) 266 US 243 at 258); and that its allowance

st be necessary to arrive at fair compensation (Concordia s. Co. v. School Dist., (1931) 282 US 545 at 554) and must not inequitable (Jackson County v. United States, (1939) 308 US 3 at 352).

The Government simply ignores the cases which establish at this was an unliquidated claim (Hanna Br 82-84) and cites ne suggesting that it was not. It even cites a Fourth Circuit se[3] which, while allowing prejudgment interest under the circumances, expressly holds that such claims are unliquidated (Gov ply Br 36). In light of the record and the authorities, the ggestion (Gov Reply Br 34) that this case resembles in any way atever an action on two $1,000 promissory notes is incredible.

The award of prejudgment interest in this case was an buse of the District Court's discretion. The Government sought recover allegedly erroneous payments for capital items of ich it had the substantial use and benefit. Hanna was not bligated to spend its own money for the Government, and the overnment does not deny that it benefited from the purchase and e of the reclassified items (Hanna Br 85). Nor does it deny hat sufficient unused capital funds were available to purchase hem until total deliveries reached 95 million pounds in September, 960. The benefit accruing to the Government from these purhases -- which were all charged back to Hanna by the District

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[3] E. I. DuPont de Nemours & Co. v. Lyles & Lang Const. Co., (CA 4 1955) 219 F2d 328 at 341.

Court -- makes an award of interest unnecessary to make the Government whole and grossly inequitable (see cases cited in Hanna's brief at page 85).

3. The District Court erred in allowing interest for a period prior to the Government's demands for reimbursement.

The Government does not refer at all to Hanna's claim that if prejudgment interest could be allowed at all (which Hanna denies), interest on each item of the award commenced only when repayment was demanded by the Government, not from the respective dates of overpayment (Hanna Br 86-90). In the absence of any response, we assume that the Government concedes the correctness of Hanna's contention that the award of prejudgment interest, if proper at all, was excessive by $26,840.34.

CONCLUSION

The District Court erred in reforming the agreed ceiling price in Amendment 5 and awarding prejudgment interest from the dates of overpayment on the relatively small amount of the Government's claim which it allowed. The judgment in favor of the Government should be reduced to $231,506.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of ıe foregoing brief, I have examined Rules 18 and 19 of the ıited States Court of Appeals for the Ninth Circuit, and that, ı my opinion, the foregoing brief is in full compliance with ıose rules.

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Attorney